IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 7139 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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POST MASTER - Petitioner(s)
Versus
J S SAIYED - Respondent(s)

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Appearance :
MS SEJAL K MANDAVIA for Petitioner(s) : 1,
MR PH PATHAK for Respondent(s) : 1,
MR RC PATHAK for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

RESERVED ON 22.6.2007

Date of Pronouncement :28/06/2007

CAV JUDGMENT

1. Heard learned advocate Ms.S.K.Mandavia, appearing on behalf of petitioner and learned advocate Mr.P.H.Pathak for respondent.

2. In the present petition, the petitioner has challenged the award passed by Central Government Industrial Tribunal cum Labour Court, Ahmedabad in Industrial Dispute No.38 of 2004 dated 22.9.2004. The Central Government Industrial Tribunal cum Labour Court, Ahmedabad has set aside the termination order with a direction to petitioner to reinstate the respondent workman to his original post with continuity of service and to pay 30% back wages to the workman from the date of termination till the date of order of reference – 9.6.1995. The Central Government Industrial Tribunal cum Labour Court, Ahmedabad further directed that if the workman is not reinstated within a period of 30 days of the publication of award, the petitioner shall pay full back wages prevailing at the time of award to the workman. A cost of Rs.1000 has also been award in favour of workman by the Tribunal cum Labour Court.

3. The petitioner has placed on record the statement of claim filed by workman at Annexure-B

and written statement filed by petitioner at Annexure-C along with statement of working of the respondent workman between 1.1.1985 to 31.12.1991 as per pay bills of Anand Post Office and Dakor Head Office at Annexure-D. By Annexure-E, service rules from Swami for the ED Staff has been placed on record. Except that, no other annexures are attached to the petition.

4. Initially, this matter has been placed before the Hon'ble Division Bench of this Court (Coram : G.S.Singhvi & Anand S. Dave,JJ.). The Division Bench has passed following order on 21.4.2005 :

> “Heard Smt.K.Mandavia for the petitioner and perused the record.
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> We are prima facie of the view that the finding recorded by the learned Presiding Officer, Industrial Tribunal-cum-Labour Court, Ahmedabad that the respondent workman had worked for 240 days in 12 months preceding the termination of his service is a finding of fact, which is based on correct appreciation of evidence and does not call for interference under Article

226 of the Constitution of India. However, we feel that the issue of back wages would require consideration by the court.

Admit.

The petitioner's prayer for staying the impugned award is rejected insofar as it relates to reinstatement of the respondent workman. However, in the peculiar facts of the case, we deem it proper to stay the award of back wages to the extent of 50%. This would necessarily mean that the petitioner shall have to take the workman back in service in accordance with the direction given in the impugned award and pay 50% of the awarded back wages.

If the petitioner fails to reinstate the workman within next 15 days and pay the amount of 50% awarded back wages, then the partial interim order passed today shall stand vacated automatically and the workman shall then be entitled to avail the appropriate remedies including the one by filing an application under Section 29 of the Industrial Disputes Act, 1947 for prosecution of the officer concerned.

> A copy of this order be served upon the workman along with notice of the writ application."

5. The aforesaid order of the Hon'ble Division Bench was challenged by the petitioner before the Hon'ble Apex Court being Civil Appeal No.1261 of 2007 where the Hon'ble Apex Court has passed following order on 9.3.2007 :

> "The appeal above-mentioned being called on for hearing before this Court on the 9th day of March,2007, UPON perusing the record and hearing counsel for the parties herein, THIS COURT DOTH PASS the following ORDER :
>
> 'Having regard to the fact that the question as to whether the Department of Post Office is an Industry, is pending consideration before the High Court Gujarat, we are of the opinion that the impugned order cannot be sustained. It is set aside accordingly and the matter is remitted to the High Court for consideration thereof afresh. However, we would request the High Court to consider the desirability of disposing of the writ

petition filed by the respondent as expeditiously as possible, preferably within a period of four weeks from the date of communication of this order.

The appellant shall pay a further sum of Rs.10,000/- to the respondent by way of litigation costs.

The appeal is disposed of with the aforementioned direction."

6. After the order passed by the Hon'ble Division Bench, as referred above, the petitioner herein has preferred Civil Application No.4050 of 2005 before the Hon'ble Division Bench wherein two months' time was sought for implementation of Division Bench's order dated 21.4.2005 and on 10.5.2005, the Hon'ble Division Bench had granted the same.

7. After the direction issued by the Hon'ble Apex Court as referred above, the Registry of this Court has placed this matter before the Hon'ble Division Bench of this Court (Coram : M.S.Shah & H.B.Antani,JJ.) for final hearing. Before the Hon'ble Division Bench, learned

advocate Mr.Pathak appearing for respondent has raised objection that as per the roster, this matter is required to be placed before the learned Single Judge. Therefore, on 23.4.2007, the Hon'ble Division Bench has passed following order :

> “Mr.Pathak for the respondent states that the matter, as per roster, is required to be placed before the learned Single Judge.
>
> Office to examine this issue and thereafter, place the matter before appropriate Bench.”

8. Thereafter, the matter was placed before this Court on 14.6.2007. On that day, learned advocate Ms.Mandavia has filed sick note. Therefore, the matter was adjourned to 15.6.2007, considering the direction issued by the Hon'ble Apex Court. Thereafter, on 15.6.2007, learned advocate Ms.Mandavia, asked for some time as other side has no objection. Therefore, matter was adjourned to 19.6.2007. On 20.6.2007, this Court was not able to take up the matter because of the heavy

board and the matter was adjourned to 21.6.2007. On 21.6.2007, learned advocate Ms.Mandavia has completed her submissions and the matter was adjourned to 22.6.2007. On 22.6.2007, learned advocate, Mr.Pathak has completed his submissions. Therefore, the matter was reserved for judgment.

9. Learned advocate Ms.Mandavia appearing on behalf of petitioner has submitted that Tribunal cum Labour Court has no jurisdiction to entertain the reference because the postal department is not an 'industry' within a meaning of Section 2(j) of the I.D.Act,1947. She further submitted that the respondent was not appointed on clear vacant post and he has not completed 240 days service. The respondent workman had worked on different posts and different categories at different places as substitute service provided by the regular incumbents was proceeding on leave for limited period. Therefore, according to her submissions, respondent workman was not employed by the petitioner and he was offered

work on ad-hoc basis and as such, he has no right to post.

10. Learned advocate Ms.Mandavia relied upon the decision of the Apex Court in case of Sub-Divisional Inspector of Post, Vaikam and Others v. Theyyam Joseph and others, reported in (1996) 8 SCC 489, particularly Head Note 'C' & 'D'. The Apex Court in aforesaid decision held that, “postal department is not an 'industry' and extra departmental agents in postal department are held to be civil servants and not the workmen attracting the provisions of I.D.Act.”. She relying upon Head Note 'D' submitted that ad-hoc extra departmental agent (ED Packer in this case) appointed de-hors the rules as a substitute to the regular ED Packer where service was terminated before completion of three years' service, the person concerned, held, entitled under rule 6 of Conduct Rules to one month allowance plus DA and not to reinstatement but where the period of service exceeded three years, CAT's order of reinstatement left undisturbed.

11. Learned advocate Ms.Mandavia also relied upon another decision of the Apex Court in case of Union of India & Anr. v. Kamlesh Kumar Bharti, reported in (1998) 9 SCC 727. In the aforesaid decision, the Apex Court has held that post office is not an 'industry' and in case of termination of service of an extra departmental delivery agent, provision of Section 25-F is not applicable since post office is not an 'industry'. Said decision has been given by Apex Court relying upon earlier decision of Apex Court in case of Sub-Divisional Inspector of Post, Vaikam and Others v. Theyyam Joseph and others, reported in (1996) 8 SCC 489.

12. She further submitted that aforesaid contentions were raised by the petitioner before the Tribunal cum Labour Court by filing the written statement but the Tribunal cum Labour Court has not considered the contentions raised in written statement and ignored the same and passed an award and, therefore, the Tribunal cum

Labour Court has committed gross error in deciding such reference. She also submitted that details of working with the respondent also narrated in written statement. The contention of industry also raised before the Tribunal cum Labour Court in the written statement. Therefore, the Tribunal cum Labour Court has committed gross error in passing such award. She also submitted that decisions of the Apex Court, as referred above, as well as relevant service rules were cited before the Tribunal cum Labour Court, even though same were not considered by the Tribunal cum Labour Court. Therefore, the Tribunal cum Labour Court has committed gross error in passing such award. She relied upon Swamy's Service Rules for ED Staff, Instruction No.(1) of Director General's Instruction which suggests that such workmen were appointed with the approval of appointing authority in place of regular employee when permitted to go on leave. Therefore, this workman was similarly appointed and not entitled the benefit as a regular employee and also not entitled reinstatement and

regularization. She also submitted that the Tribunal cum Labour Court has committed an error in granting back wages in favour of workman. The statement produced by the petitioner was not taken into account as respondent workman has not completed 240 days and, therefore, it does not amount to retrenchment. The respondent workman was gainfully employed and was earning Rs.500/- to Rs.600/- per month during the interim period. The decisions given by CAT of similar cases were also produced by the petitioner before the Tribunal cum Labour Court which have also been ignored by the Tribunal cum Labour Court. Therefore, according to her submissions, the respondent workman offered the work on ad-hoc basis and as such, he has no right to post. Except the aforesaid submissions, no other submissions made by learned advocate Ms.Mandavia and no other decision relied by her in support of her submissions.

13. Learned advocate, Mr.Pathak appearing on behalf of respondent submitted that petitioner

has filed written statement before the Tribunal cum Labour Court and except that, petitioner has not led any oral evidence before the Tribunal cum Labour Court. Vide Exh.18, respondent workman has submitted that a list of documents which was marked as Exh.18/1 to Exh.18/11. Since there was no objection by the petitioner for the said exhibition, The said documents were exhibited as Exh.19 to Exh.27. The petitioner has produced documentary list vide Exh.6 marked as Exh.6/1 to Exh.6/7. Out of aforesaid documents, only one document Mark 6/1 has been proved in evidence which was exhibited as Exh.11. Rest of the documents not proved by the petitioner. The workman was examined vide Exh.10 and vide Exh.12, evidence of workman was closed. No oral evidence led by petitioner and vide Exh.14 the evidence of the petitioner was closed by filing pursis before the Court. The written arguments were submitted by both the parties which were taken on record by the Tribunal cum Labour Court. Therefore, learned advocate Mr.Pathak submitted that contention of industry, though raised, not proved

by petitioner by leading proper oral and documentary evidence. He also submitted that merely raising contention in written statement without proving the same by leading proper evidence, the Tribunal cum Labour Court is not duty bound to consider such contention as raised in written statement. He also submitted that before the Tribunal cum Labour Court, no specific contention was pressed into service by the petitioner. He also submitted that no evidence was led by petitioner to prove contention of substitute. He also submitted that the Tribunal cum Labour Court has examined the record and come to the conclusion on the basis of the record produced by petitioner vide Exh.6/1 a letter and statement showing the working of the workman which was clear from aforesaid records that at the time of termination of the workman had worked for more than 240 days in 12 calender months preceding the date of termination. He also submitted that not only that but workman had worked for 341 days in the year 1990. Exh.21 relied by Tribunal cum Labour Court also proved

the said fact which was not rebutted by the petitioner. He also submitted that though documentary evidence were in possession of the petitioner but not produced before the Tribunal cum Labour Court. Therefore, learned advocate Mr.Pathak submitted that once the workman had proved before the Tribunal cum Labour Court by documentary evidence that he had completed continuous service within a meaning of Section 25B of the I.D.Act,1947, then, Section 25F of the I.D.Act,1947 must have to be followed being a condition precedent which was not followed by the petitioner and therefore, the Tribunal cum Labour Court has rightly set aside the termination order. He also submitted that the Tribunal cum Labour Court has relied upon the decision of Apex Court in case of Sundar Mani v. State Bank of India, 1976 3 SCR 160 and Robert D'Souza v. Executive Engineer Southern Railway. He also submitted that in the year 1988, 1989 and 1990, the workman had completed continuous service of 240 days which was proved before the Tribunal cum Labour Court and the Tribunal cum

Labour Court has rightly granted 30% back wages from the date of termination till the date of award. He also submitted that the decision relied by learned advocate Ms.Mandavia, was subsequently considered by Larger Bench in case of General Manager, Telecom v. S. Srinivasan Rao & Ors. 1997 (2) GLH 990. Learned advocate Mr.Pathak submitted that the Apex Court has held that decision rendered in case of Theyyam Joseph, as referred above, cannot be treated as laying down the correct law. Meaning thereby that the decision which has been relied by learned advocate Ms.Mandavia wherein it is held that post department is not an industry, subsequently considered by Larger Bench and said decision has been overruled by Larger Bench, therefore, decision relied by learned advocate Ms.Mandavia cannot be considered. He also submitted that subsequent decision in case of Union of India & Anr. v. Kamlesh Kumar Bharti, reported in (1998) 9 SCC 727 which also relied upon earlier decision of Theyyam Joseph as referred above is also impliedly overruled by Larger Bench as referred

above. Therefore, learned advocate Mr.Pathak submitted that postal department is held to be an industry by Larger Bench including Telecom department. He also submitted that once the postal department held to be an industry, then, I.D.Act is applicable and if the mandatory provisions were not followed before terminating the service of respondent, then, the Tribunal cum Labour Court has not committed any error which required interference by this Court while exercising the power under Article 227 of the Constitution of India.

14. I have considered the submissions made by both the learned advocates and have also perused the award passed by the Tribunal cum Labour Court.

15. In respect to contention raised by learned advocate Ms.Mandavia that postal department is not an industry relying upon aforesaid two decisions in support of her submissions, the Larger Bench decision referred above in case of General Manager, Telecom reported in 1997 (2) GLH

990 and relevant observations made by Apex Court while referring and relying upon 7 Judges Bench decision of Apex Court in case of Bangalore Water Supply & Sewerage Board v. A. Rajappa & Ors., reported in (1978) 2 SCC 213. The observations made by Apex Court in Para.5, 6 and 7 in case of General Manager, Telecom v. S. Srinivasan, reported in 1997 (2) GLH 990 are relevant and, therefore, quoted as under :

> “5. The above point arises for consideration out of a Reference made under Section 10-A of the Industrial Disputes Act, 1947, which matter is now pending in the High Court. The contention of the appellant throughout has been that the Reference was incompetent since the Telecommunication Department of the Union of India is not an 'industry' within the meaning of its definition contained in the existing unamended Section 2(j) of the Industrial Disputes Act, 1947. Admittedly, this question has to be answered according to the decision of this Court in Bangalore Water Supply (AIR 1978 SC 548) (supra) which is a binding precedent. The dominant nature test for deciding whether the

establishment is an 'industry' or not is summarised in para 143 of the judgment of Justice Krishna Iyer in Bangalore Water Supply case (AIR 1978 SC 548) (supra) which is as under (Para 161 of AIR) :

143. The dominant nature test :

(a) Where a complex of activities, some of which qualify for exemption, others not, involves employees on the total undertaking, some of whom are not 'workmen' as in the University of Delhi case (AIR 1963 SC 1873) (supra) or some departments are not productive of goods and services if isolated, even then, the predominant nature of the services and the integrated nature of the departments as explained in the Corporation of Nagpur (AIR 1960 SC 675) (supra), will be the true test. The whole undertaking will be 'industry' although those who are not 'workmen' by definition may not benefit by the status.

(b) Notwithstanding the previous clauses, sovereign functions, strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by Government or statutory bodies.

(c) Even in departments dischaging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within Section 2(j).

(d) Constitutional and competently enacted legislative provisions may well remove from the scope of the Act categories which otherwise may be covered thereby.

6. It is rightly not disputed by the learned counsel for the appellant that according to this test the Telecommunication Department of the Union of India is an 'industry' within that definition because it is engaged in a commercial activity and the Department is not engaged in discharging any of the sovereign functions of the State.

7. A two-Judge Bench of this Court in Theyyam Joseph's case (1996) 8 SCC 489 : (1996 AIR SCW 1365) (supra) held that the functions of the Postal Department are part of the sovereign functions of the State and it is, therefore, not an 'industry' within the definition of Section 2(j) of the Industrial Disputes Act, 1947. Incidently, this decision was

rendered without any reference to the seven-Judge Bench decision in Bangalore Water Supply (AIR 1978 SC 548) (supra). In a later two-Judge Bench decision in Bombay Telephone Canteen Employees' Association case, AIR 1997 SC 2817, this decision was followed for taking the view that the Telephone Nigam is not an 'industry'. Reliance was placed in Theyyam Joseph's case (1996) 8 SCC 489 : (1996 AIR SCW 1365) (supra) for that view. However, in Bombay Telephone Canteen Employees' Association case (i.e. the latter decision), we find a reference to the Bangalore Water Supply case. After referring to the decision in Bangalore Water Supply, it was observed that if the doctrine enunciated in Bangalore Water Supply is strictly applied, the consequences is 'catastrophic'. With respect, we are unable to subscribe to this view for the obvious reason that it is in direct conflict with the seven-Judge Bench decision in Bangalore Water Supply case (supra) by which we are bound. It is needless to add that it is not permissible for us, or for that matter any Bench of lesser strength, to take a view contrary to that in Bangalore Water Supply (supra) or to by-pass that decision so long as it

> holds the field. Moreover, that decision was rendered long back - nearly two decades earlier and we find no reason to think otherwise. Judicial discipline requires us to follow the decision in Bangalore Water Supply case (1978) 2 SCC 213 : (AIR 1978 SC 548). We must, therefore, add that the decision in Theyyam Joseph, (1996) 8 SCC 489 : (1996 AIR SCW 1365) and Bombay Telephone Canteen Employees' Association, AIR 1997 SC 2817, cannot be treated as laying down the correct law. This being the only point for decision in this appeal, it must fail."

16. This question of industry again examined by Apex Court in case of All India Radio v. Santosh Kumar & Anr. Etc. 1998 I CLR 684, while considering the 7 Judges decision of Apex Court in case of Bangalore Water Supply (supra). In the aforesaid decision it has been held by Apex Court that All India Radio as well as Doordarshan are industries within the meaning of Section 2(j) of the I.D.Act,1947 and the said decision of Bangalore Water Supply (supra) is operative being applicable at present and as existing on the statute book as on day. The relevant observations

made by Apex Court in Para.4 and 5 are quoted as under :

> “4. The solitary contention canvassed before us by the learned senior counsel for the appellants is to the effect that All India Radio and Doordarshan Kendra discharge sovereign functions of the State and they are not industries within the meaning of S. 2(j) of the Act. Now, it has to be kept in view that as held by a Constitution Bench of this Court consisting of seven learned Judges in the case of Bangalore Water Supply and Sewerage Board v. A. Rajappa, reported in (1978) 2 SCC 213 : (AIR 1978 SC 548), save and except the sovereign functions, all other activities of employers would be covered within the sweep of term 'industry' as defined under S. 2(j) of the Act. The functions which are carried on by All India Radio and Doordarshan cannot be said to be confined to sovereign functions as they carry on commercial activity for profit by getting commercial advertisements telecast or broadcast through their various kendras and stations by charging fees. Looking to the functions of Doordarshan and its set up, as seen from Annexure-1 (annexed to S.L.P. (C) No. 7722-7722-A of 1993), being the

extracts from Doordarshan Manual Vol. I, it cannot be said that the functions carried on by them are of purely sovereign nature. Day in and day out advertisements are being telecast and even serials are being telecast on payment of appropriate charges and on which there cannot be any dispute. Same is the position with All India Radio. However, learned senior counsel for the appellants vehemently relied upon a decision of this Court in the case of Bombay Telephone Canteen Employees' Association, Prabhadevi Telephone Exchange v. Union of India (1997) 6 SCC 723 : (1997 AIR SCW 2819). It is true that in that case a Bench of two learned Judges took the view that the Telephone Exchanges run by the Central Government were discharging sovereign functions and, therefore, the employees working in the canteen run by such Telephone Exchanges cannot be said to be working in 'industry' as defined under S. 2(j) of the Act. However, the said decision has been expressly overruled by a judgment of a three-Judge Bench of this Court in the case of General Manager, Telecom v. A. Srinivasa Rao (1997) 8 SCC 767 : (1998 AIR SCW 270). In that case, Chief Justice Verma speaking for the three-Judge Bench in paragraph 7 of the Report

has expressly overruled the said decision. In that decision other decision in Sub-Divisional Inspector of Post v. Theyyam Joseph (1996) 8 SCC 489 : (1996 AIR SCW 1365) is also overruled. It has been held in the said decision that the ratio of the Constitution Bench judgment in Bangalore Water Supply (supra) holds the field and the amendment to the definition of S. 2(j) as made in 1982 is not still brought in force and so long as the amending definition does not come into force the decision in Bangalore Water Supply (AIR 1978 SC 548) (supra) will hold the field. Consequently, it must be held that the appellant-All India Radio as well as Doordarshan are industries within the meaning of S. 2(j) of the Act and the said definition is operative being applicable at present and as existing on the Statute Book as on date.

5. We may mention that so far as the question of illegality of the orders of termination is concerned, on the facts found by the authorities below it is to be held that the termination orders were violative of S. 25-F of the Act and on which, in fairness to the learned senior counsel for the appellants, no submission

> was raised before us for consideration. Similarly regularisation of services was also not challenged on merits. As a result of this discussion the appeals are dismissed. Interim stay orders are vacated. The respondents concerned will be reinstated in service with all the benefits available to them under the impugned orders. The appellants shall reinstate the respondents concerned within six weeks from today and implement the orders passed by the authorities below within that time. It is obvious that the reinstatement will be on the same post in which the respondents were working prior to the impugned termination orders."

17. Recently, the Apex Court in 5 Judges Bench in case of State of U.P. v. Jai Bir Singh reported in 2005 AIR SCW 2773, has examined the question of industry while considering the decision of Apex Court in case of Bangalore Water Supply (Supra) and ultimately the matter was referred to Larger Bench for interpretation of definition of 'Industry" and for re-consideration by it, if necessary, the decision rendered in Bangalore Water Supply case reported in AIR 1978 SC 969 and

548. But so long Larger Bench overrules the decision of Bangalore Water Supply, the said decision of Bangalore Water Supply, as referred above, is binding precedent under Article 141 of the Constitution of India to the High Court.

18. Recently, the Apex Court in case of Palitana Sugar Mills Pvt. Ltd and Anr. v. Smt. Vilasiniben Ramchandran and Ors., reported in 2007 AIR SCW 2655 held in Para.12 that, “it is well settled that the judgment of this Court are binding on all the authorities under Article 142 of the Constitution and it is not open to any authority to ignore a binding judgment of this Court on the ground that the full facts had not been placed before this Court and/or the judgment of this Court in the earlier proceedings had only collaterally or incidentally decided the issues raised in the show cause notice. Such an attempt is to belittle the issues and the orders of this Court.”

19. Therefore, so long the decision remained in

statute book and existence, not overruled by Hon'ble Apex Court, that decision is binding to High Court under Article 141/142 of the Constitution being a precedent. Therefore, the decision of Apex Court relied by learned advocate Ms.Mandavia in support of her submissions are overruled by Apex Court in a subsequent decision. Therefore, the contention raised by learned advocate Ms.Mandavia that petitioner is not an industry relying upon aforesaid overruled decision cannot be accepted and same are hereby rejected.

20. In respect of contention that respondent was appointed as substitute in place of regular E.D. Packer and that he was civil servant, no evidence is led to prove aforesaid contention. Merely raising the contention in written statement does not have any evidentiary value. But contention must be raised and proved by the party before the concerned Court by leading proper evidence and by producing relevant documents. The petitioner has not produced any

relevant documents to prove the contention that respondent was civil servant. The petitioner has also not led any oral evidence to prove the contention that respondent was civil servant. Therefore, the contentions in written statement have no any evidentiary value and therefore, in absence of evidence from the petitioner before the concerned Court, the Tribunal cum Labour Court has rightly not examined the issue. The respondent workman was appointed for the period from 1985 to 1991. He remained in service all throughout without any break. His service was terminated on 31.12.1991. He was appointed as a Packer against clear vacant post which is considered to be a permanent post, because he was performing permanent nature of work. The respondent workman is covered by definition of 'workman' under Section 2(s) of the I.D.Act,1947, which is quoted as under :

> "**Section 2(s):** "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical

or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person -

(i) who is subject to the Air Force Act,1950 (45 of 1950), or the Army Act,1950 (46 of 1950), or the Navy Act,1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a person; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions

mainly of a managerial nature.”

21. While considering the aforesaid definition of 'workman', the respondent workman has proved by his oral evidence before the Tribunal cum Labour Court vide Exh.10 that he was performing the work as a Packer employee with the petitioner doing manual and clerical work. In the definition of 'workman', there is no difference between casual workman, substitute, temporary, Badli workman or ad-hoc workman. Any kind of appointment of the workman employed by employer for doing skilled or unskilled work either as casual, temporary, ad-hoc, Badli workman are considered to be a workman within a meaning of Section 2(S) of the I.D.Act,1947. Apart from that, no specific contention was raised by petitioner before the Tribunal cum Labour Court that respondent is not workman within a meaning of Section 2(S) of the I.D.Act,1947. Therefore, the Tribunal has not decided the issue as it was not raised by the petitioner and once the I.D.Act,1947 is applicable, then, respondent workman is covered

by definition of 'workman'. That aspect has been rightly considered by the Tribunal cum Labour Court.

22. According to submission made by learned advocate Ms.Mandavia that the petitioner has raised all the contentions in written statement and in written arguments before the Tribunal cum Labour Court but the Tribunal cum Labour Court has not considered the same. Relevant thing is that number of contentions can be raised by the parties before the Court. But ultimately which contention is pressed into the service before the concerned Court is important. If contention was pressed into service and not considered by Court, then, remedy is for such party to immediately approach the same Court. But if contention was not pressed though raised in the petition or in the written statement, then, Court is not duty bound to consider the contention which was not pressed into service. Ultimately the record of the Court is conclusive and is to be believed as correct. The statement or submission of lawyer

should not be believed to be contrary to the record of Court. This aspect has been considered by Apex Court in case of State of Maharashtra v. Ramdas Shrinivas Nayak reported in AIR 1982 SC 1249. Relevant observations are in Para.4,5,6 and 7 are quoted as under :

> “4. When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A. K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submission made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us Judicial decorum restrains us. Matters of Judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation". (Per Lord Atkinson in Somasundaran v. Subramanian, AIR 1926 PC 136). We are bound to accept the statement

of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still, fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to 'the fact that the statement made with regard to his conduct was a statement that had been made in error (Per Lord Buckmaster in Madhusudan v. Chandrabati, AIR 1917 PC 30). That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases

to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

4-A. In R. v. Mellor (1858) 7 Cox CC 454 Martin B was reported to have said : "We must consider the statement of the learned judge as absolute verity and we ought to take. his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity."

5. In King. Emperor v. Barendra Kumar Ghose, (1924) 28 Cal WN 170 : (AIR 1924 Cal 257) (FB), Page, J. said.
".....these proceedings emphasise the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the course of a trial before him is final and decisive; it is not to be criticised or circumvented; much less is it to be exposed to animad version."

6. In Sarat Chandra v. Bibhabati Debi (1921) 34 Cal LJ 302 : (AIR 1921 Cal 584), Sir Asutosh Mookherjee explained what had

to be done :

"It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge, without delay and ask for rectification or review of the judgment".

7. So the Judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge, himself, but nowhere else."

23. Similar aspect has been examined by the Apex Court in case of Daman Singh v. State of Punjab and Ors. reported in AIR 1985 SC 973. Relevant observations are in Para.13, which is quoted as under :

"13. The final submission of Shri Ramamurthi was that several other questions were raised in the writ petition before the High Court but they were not considered. We attach no significance to this submission. It is not unusual for parties and counsel to raise innumerable

> grounds in the petitions and memoranda of appeal etc., but, later, confine themselves, in the course of argument to a few only of those grounds, obviously because the rest of the grounds are considered even by them to be untenable, No party or counsel is thereafter entitled to make a grievance that the grounds not argued were not considered. If indeed any ground which was argued was not considered it should be open to the party aggrieved to draw the attention of the Court making the order to it by filing a proper application for review or clarification. The time of the superior courts is not to be. wasted in enquiring into the question whether a certain ground to which no reference is found, in, the judgment of the subordinate court was argued before that court or not?”

24. The Tribunal cum Labour Court has rightly come to the conclusion based on documentary evidence that workman had completed continuous service of 240 days in the year 1988, 1989 and 1990 and also rightly considered the question of back wages relying upon the evidence of workman that he has earned Rs.500 to 600 per month and

therefore, not granted full back wages of interim period and granted only 30% back wages of interim period from the date of termination till the date of award. Undisputedly, Section 25F has not been followed which is mandatory provision, therefore, the order of termination is ab initio void as held by Apex Court in case of Mohan Lal v. Management of M/s. Bharat Electronics reported in AIR 1981 SC 1253. The aforesaid finding given by Tribunal cum Labour Court is based upon legal evidence. Therefore, the Tribunal cum Labour Court has granted reinstatement with continuity of service with 30% back wages of interim period.

25. The Tribunal cum Labour Court has considered the evidence on record looking to terms of reference. The issues were framed to be decided in this reference whether action of first party in terminating the service of the workman is legal and justified or not and whether he is entitled for reinstatement to his original post with continuity of service and what should be the back wages to be granted to the workman

concerned. The Tribunal cum Labour Court has given detailed reasons in support of its conclusion which are recorded in Para.8, 9 and 10, which are quoted as under :

> “8. As per the evidence at Ex.10 the second party workman was working with the first party since 1985 and he has worked till 31st December 1991. He has also worked as ED Messenger and lastly he was working as a ED stamp vendor. The first party has produced a document by Exh.6, 6/1 as a letter and a statement showing the working of the second party. Thus, looking to this document it is clear that at the time of termination the second party has worked for more than 240 days in 12 calendar months preceding the date of termination. Not only that the workman has worked for 341 days in the year 1990. Thus it is clear that the second party has completed 240 days in the calendar year. The first party's document Ex.21 also proves the same fact which has not been rebutted by an evidence through documentary evidence was in their possession. Thus this Tribunal come to the conclusion that the workman has worked for more than 240 days in a 12 calendar months preceding a

termination. It was an obligatory on the part of the first party to follow provisions of the I.D.Act before the termination of the workman. The first party violated section 25-F of the I.D.Act which is a mandatory provision. The termination of the workman is nothing but a retrenchment. Thus the action of the first party is in violation of Section 25-F while terminating the services of the second party workman which is illegal and unjust.

9. Looking to the various decision of the Apex Court namely (10 Sunder Mani v. State Bank of India 1976 3 SCR 160 (2) Robert D'Souza v. Executive Engineer Southern Railway, if the retrenchment is in violation of Section 25-F workman is entitled for the reinstatement to his original post with continuity of service and also with back wages. It is clear that no notice or notice pay was given to the workman a the time of retrenchment and no compensation was paid though the workman has completed 240 days of continuous service in the year 1988, 1989 and 1990. Thus, the workman is entitled for the reinstatement to his original post with continuity of service and back wages. Looking to the evidence of the workman

that he has earned Rs.500 to 600 per month, it is not just to saddle the burden of full back wages on the first party. However, looking to this evidence workman is entitled for 30% of back wages from the date of termination till the date of award. And after publication of award the workman is entitled for full back wages till the first party reinstate the workman to his original post.

10. Looking to the above observation it is clear that the action of the Senior Supdt. Post Offices Anand in terminating the services of Shri J.S.Saiyed is illegal and unjust. The workman Shri J.S.Saiyed is to be reinstated to his original post with the continuity of service by Sr. Supdt Post Office Anand and to pay the workman 30% back wages from the date of termination till the publication of the award. And if the first party does not reinstate the workman to his original post then a full pay prevailing at the time of award shall be paid to the concerned workman Shri J.S.Saiyed till the date of reinstatement. Looking to the above observation, I hereby pass the following order.

AWARD

> Reference is partly allowed. The action of the management i.e. Sr.Supdt of Post Office Anand in terminating the services of Shri J.S.Saiyed is hereby declared as illegal and unjust. The first party Sr. Supdt of Post office is hereby ordered to reinstate Shri J.S.Saiyed to his original post with continuity of service and to pay 30% back wages to the workman from the date of termination i.e. 31.12.1990 till the date of order of the reference. If the workman is not reinstated within 30 days of the publication of the award, the first party shall pay full back wages prevailing at the time of award to the workman. The first party shall also pay Rs.1000 as a cost to the second party. The order shall be implemented within 30 days of the publication of the award."

26. The above finding given by the Tribunal cum Labour Court is based on proved documents and oral evidence of workman. In absence of oral evidence of petitioner, the Tribunal cum Labour Court has rightly relied and believed the oral evidence of workman. The finding given by the Tribunal cum Labour Court is based on legal

evidence. The finding given by the Labour Court is not contrary to the records. Learned advocate Ms.Mandavia is not able to point out any infirmity in the finding given by the Tribunal cum Labour Court. She is also not able to point that finding is baseless or perverse. On the contrary, in my opinion, looking to the evidence on record, oral as well as documentary, the conclusion reached by the Tribunal cum Labour Court is perfectly justified. The Tribunal cum Labour Court has not committed any error while passing such award which requires interference by this Court under Article 227 of the Constitution of India. Once the main challenge of the petitioner relying on the Apex Court's decision has been overruled by subsequent decision of Apex Court and also the contention of substitute based on overruled decision fails, then, nothing remains in the contention of petitioner. Therefore, the contention raised by learned advocate Ms.Mandavia before this Court totally fails and same are rejected.

27. The submission is made by learned advocate Ms. Mandavia that the respondent was appointed as substitute in place of regular E.D. Packer but, no oral or documentary evidence is produced by petitioner before Tribunal cum Labour Court. The respondent remained in continuous service with the petitioner from 1985 to 31.12.1991 for more than six years. The respondent was appointed without following Recruitment Rules which is dehors the Rules. Therefore, the respondent cannot be considered to be a civil servant as alleged by petitioner. If Rules are followed, then legal notice is necessary before terminating service of the respondent. The petitioner has not raised specific plea before the Tribunal cum Labour Court about this contention. When contention with regard to whether petitioner department is an 'industry' or not and also the contention with regard to whether the respondent was appointed as substitute in place of regular E.D. Packer were not pressed before the Tribunal cum Labour Court, then, for the first time it is not

permissible to raise them before this Court. Both contentions are mixed question of facts and laws. For that, no evidence of any kind is on record of Court produced by the petitioner. The petitioner has not prepared seniority list as per Rules 77 of Central Industrial Disputes Rules. The said provision of Rule 77 is mandatory and violation of it renders termination order bad. Page 33 - Annexure-D is produced by the petitioner which is not complete record of working days of the respondent. The details show that respondent worked only for some days. Annexure-D is produced to prejudice this Court without giving correct details. Learned Advocate Ms. Mandavia relied upon overruled decision of Apex Court. This fact was brought to the notice of learned advocate Ms. Mandavia. Even then, she relied upon such overruled decision with regard to 'industry' and 'substitute'. I fail to understand the submissions made by the petitioner's advocate. When learned advocate Mr. Pathak pointed out the decision of larger Bench in Telecom department that decision of Apex

Court relied on by learned advocate Ms. Mandavia is overruled, learned advocate Ms. Mandavia has not countered the submissions of learned advocate Mr. Pathak. In view of decision of Apex Court in case of Telecom Department, as the postal department is held to be industry, the I.D. Act applicable to postal department and, therefore, the respondent is workman within meaning of Section 2(s) of the I.D. Act, 1947. The completion of 240 days by respondent within the meaning of Section 25B is proved by oral evidence of workman and documents which are on record. Undisputedly, as Section 25F is not followed by petitioner at the time of termination, then the termination order becomes ab initio void and, therefore, the respondent is deemed to be in service for all the purposes and entitled to normal and natural consequences of reinstatement and back wages which has rightly been granted by Tribunal cum Labour Court. Thus, no error is committed by Court which requires any interference under Article 227 of Constitution of India by this

Court.

28. This Court is having very limited jurisdiction under Article 227 of the Constitution of the India. This Court cannot act as an appellate authority. This Court cannot interfere unless the error which found apparently on the face of record. The Tribunal cum Labour Court has not committed either error of law or error of facts which requires interference by this Court under Article 227 of the Constitution of India. Even in case of two views are possible then also interference by this Court under Article 227 of the Constitution of India is uncalled for. Therefore, according to my opinion, the Tribunal cum Labour Court has perfectly appreciated the oral as well as documentary evidence produced by respective parties and rightly examined the same evidence and finding is based upon legal evidence and conclusion is perfectly justified based on records. Therefore, the Tribunal cum Labour Court has not committed any error which requires interference by this

Court under Article 227 of the Constitution of India. Hence, there is no substance in the present petition. Therefore, present petition is dismissed with no order as to costs.

(H.K.Rathod,J.)

(vipul)